

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DESSIE YOH-ELSTON and U.S. POSTAL SERVICE,
DELPHOS POST OFFICE, Delphos, Ohio

*Docket No. 96-2426; Submitted on the Record;
Issued August 24, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective February 5, 1994.

The Board has duly reviewed the evidence of record in this appeal and finds that the Office met its burden of proof in terminating appellant's compensation benefits effective February 5, 1994.

On June 11, 1992 appellant, then a part-time flexible clerk, filed a claim alleging that she first realized that her carpal tunnel syndrome of the left and right wrists was caused or aggravated by her employment on January 24, 1992. Appellant stopped work on December 28, 1992. Her claim was accepted by the Office and she received compensation benefits.

By letter dated May 20, 1993, the Office referred appellant along with medical records, a statement of accepted facts and a list of specific questions to Dr. Robert Hartwig, a Board-certified orthopedic surgeon, for a second opinion examination.

The Office subsequently found a conflict in the medical opinion evidence between Dr. Hartwig's opinion that appellant no longer had any disability causally related to the accepted employment injury and the opinion of Dr. Lee A. Klopfenstein, a Board-certified family practitioner and appellant's treating physician, that she remained totally disabled due to the accepted employment injury. By letter dated January 21, 1994, the Office referred appellant along with medical records and a statement of accepted facts to Dr. Richard Deerhake, a Board-certified orthopedic surgeon, for an impartial medical examination.

By decision dated March 1, 1994, the Office found the evidence of record sufficient to establish that the claimed medical condition and disability had ceased as of February 5, 1994. In an accompanying memorandum, the Office found that Dr. Deerhake's opinion constituted the weight of the medical opinion evidence.

In a March 10, 1994 letter, appellant requested an oral hearing before an Office representative. By decision dated February 21, 1995, the hearing representative affirmed the Office's March 1, 1994 decision.

In a January 22, 1996 letter, appellant requested reconsideration of the Office's decision accompanied by medical evidence. By decision dated February 7, 1996, the Office denied modification of its prior decision.

In a May 1, 1996 letter, appellant, through her counsel, requested reconsideration of the claim and submitted medical evidence. By decision dated May 14, 1996, the Office denied appellant's request for modification based on a merit review of the claim.

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying termination or modification of compensation benefits.¹ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.²

In the present case, the Office accepted that appellant sustained bilateral wrist overuse syndrome due to factors of her federal employment. The Office terminated appellant's compensation benefits based on Dr. Deerhake's impartial medical opinion that appellant no longer had any disability causally related to the accepted employment injury. In a February 15, 1994 medical report, Dr. Deerhake provided a history of the employment injury, appellant's medical treatment, a review of the medical records and his findings on physical examination. Dr. Deerhake stated:

"This [appellant] is complaining of symptoms of painful bilateral upper extremities. It is my opinion that this [appellant's] findings at this point in time are not organic in nature. They seem to be hysterical in nature, and I find no reason to find that she has a disability from an orthopedic problem. If she has any problem at this point in time it seems to be psychiatric or psychological. There is no good organic orthopedic explanation for her findings at this point. I do not feel that I can be any clearer in this regard, I find no reason to put her off on disability or give her a permanent disability in regard to her problem. Her problem is psychological and not orthopedic or musculoskeletal in nature. There is no reason for her to show the ratchety weakness which was shown, there is no good objective evidence for an inflammatory muscular condition and the diagnosis of an acute chronic tendinitis as far as I am concerned is horse pucky."

In an accompanying work restriction evaluation dated February 3, 1994, Dr. Deerhake reiterated his physical findings and indicated that appellant could work eight hours per day with no physical restrictions.

¹ *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

² *Jason C. Armstrong*, 40 ECAB 907 (1989).

Section 8123(a) of the Federal Employees' Compensation Act provides that "[i]f there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."³ The opinion of appellant's treating physician, Dr. Klopfenstein, stated that appellant was totally disabled due to the accepted employment injury. The second opinion of Dr. Hartwig provided that appellant had no disability causally related to the accepted employment injury. As a conflict was created in the medical opinion evidence between Drs. Klopfenstein and Hartwig as to whether appellant had any continuing disability causally related to the accepted employment injury, the Office properly referred appellant to Dr. Deerhake for an impartial medical evaluation.

When there exists opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁴

The Board finds that Dr. Deerhake's opinion is well rationalized and based on an accurate medical and factual background to support a finding that appellant is no longer disabled due to the accepted employment injury. Therefore, it must be accorded special weight on the issue of whether appellant had any continuing disability. Inasmuch as Dr. Deerhake's opinion constitutes the weight of the reliable, probative and substantial evidence, the Board finds that the Office properly terminated appellant's compensation benefits.

Appellant submitted a December 17, 1992 medical report of Dr. Steven A. Cremer, a Board-certified physiatrist, which revealed a history of appellant's employment injury and his findings on physical examination. Dr. Cremer diagnosed severe tendinitis (peripheral enthesopathies) and opined that appellant was totally disabled. Dr. Cremer's report is insufficient to establish continued disability inasmuch as it failed to address a causal relationship between appellant's disability and the accepted employment injury. Appellant also submitted Dr. Cremer's November 28, 1995 medical report indicating a history of appellant's employment injury and medical treatment, and a review of a December 1, 1995 functional capacity evaluation report. Dr. Cremer opined that appellant had persistent overuse tenosynovitis and soft tissue myofascial pain syndrome related to repetitive motion work. Dr. Cremer further opined that based on his examination and functional capacity testing, appellant was totally disabled from her position as a postal clerk or in mail sorting. Dr. Cremer failed to provide sufficient medical rationale for his opinion that appellant's disability was related to motion work. In an April 15, 1996 letter, Dr. Cremer stated that appellant did not have a psychiatric condition, recommended that appellant seek medical treatment from a physiatrist or an occupational medicine physician and that appellant undergo more complete functional capacity evaluation. Dr. Cremer opined that it would be a disservice to appellant in some degree to declare her permanently disabled and to society in general. Dr. Cremer's letter is insufficient to establish continuing disability

³ 5 U.S.C. § 8123(a).

⁴ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

inasmuch as it does not address whether appellant's disability was caused by the accepted employment injury.

Appellant also submitted Dr. Klopfenstein's May 16, 1994 medical report which provided that appellant's symptoms progressed despite the implementation of the rehabilitation recommendations of Drs. Cremer and Mark Reecer that appellant perform light-duty work. Dr. Klopfenstein concluded that appellant remained disabled from her previous job at the employing establishment. Dr. Klopfenstein's report failed to address a causal relationship between appellant's disability and the accepted employment injury. Dr. Klopfenstein's December 2, 1994 medical report revealed a diagnoses of bilateral overuse tendinitis, a history of appellant's medical treatment and his findings on physical examination. Dr. Klopfenstein opined that based on appellant's long-term symptoms, her resistance to treatment and the exacerbation by return to even minimal use of the upper extremities, appellant's disability was permanent and that it was employment related by history. The additional reports from Dr. Klopfenstein, who was on one side of the conflict which was resolved by Dr. Deerhake, are insufficient to overcome the weight of the impartial medical specialist's report or to create a new conflict.⁵

Additionally, appellant submitted a medical report of Dr. Derek L. Paris, a clinical psychologist, which was prepared around September 29, 1995. In this report, Dr. Paris indicated appellant's medical treatment and his findings on psychological examination. Dr. Paris opined that appellant was psychologically normal without any evidence of hysteria or any other psychological conditions. In an April 19, 1996 letter, Dr. Paris indicated his findings on physical and psychological examination, and opined that the pain experienced by appellant was real and not a function of malingering or of psychosomatic origin. Dr. Paris' letter failed to address whether appellant's pain was caused by the accepted employment injury.

A December 1, 1995 function capacity evaluation report of Robert Frigo, a registered occupational therapist, revealed a history of appellant's employment, education, accepted employment injury and medical treatment, and appellant's aptitude skills, exercise activities and physical restrictions. Mr. Frigo recommended certain medical treatment and that appellant seek employment within her physical restrictions. An occupational therapist is not considered a "physician" under the Act and cannot render competent medical opinion evidence in support of a claim.⁶ Inasmuch as Dr. Deerhake's February 15, 1994 medical report constitutes the weight of the medical opinion evidence, the Board finds that the Office properly terminated appellant's compensation benefits effective February 5, 1994.

⁵ See *Virginia Davis-Banks*, 44 ECAB 389 (1993).

⁶ See *Barbara J. Williams*, 40 ECAB 649 (1988).

The May 14 and February 7, 1996 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
August 24, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member